

# ROLE OF THE IMMIGRATION JUDGE



OFFICE OF THE CHIEF IMMIGRATION JUDGE  
ACIJ JACK H. WEIL  
MAY 29, 2018

# Role of the Immigration Judge: Resolve Disputes Timely & Fairly



Disputes of Fact

Disputes of Law



# Examples of Disputes in Immigration Proceedings

- [REDACTED]  
[REDACTED]
  - Inadmissibility - section 212 of INA
  - Deportability – section 237 of INA
- Eligibility for relief
- Custody & Bond
- Other (e.g., motions, competence)  
[REDACTED]



# Resolution by Due Process

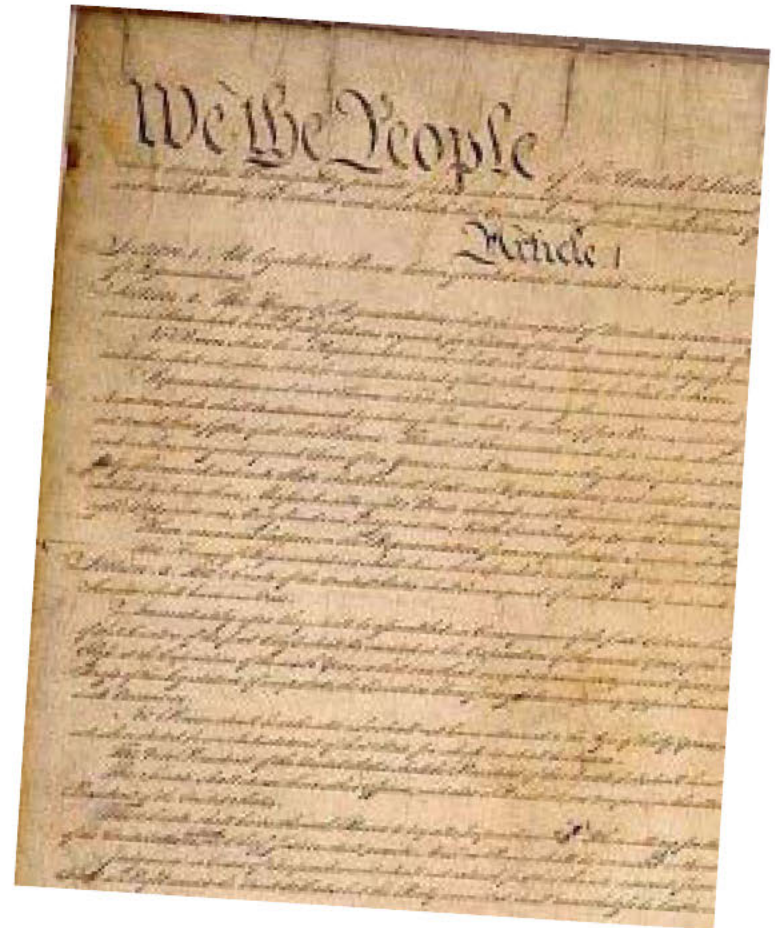
Due process requires that the proceeding be fundamentally fair.





# Sources of Due Process

The U.S. Constitution guarantees a fair judicial procedure and bars states from depriving one of life, liberty or property without due process of law.



# Principles of Judicial Conduct



**A judge shall perform the duties of judicial office impartially and diligently.**

**A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice including but not limited to bias or prejudice based upon....**

# Principles of Judicial Conduct

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# Fair Process & Fair Adjudicator

**Whether a party perceives that a proceeding is fair generally depends on two things:**

- 1) whether they believe that the adjudicator was fair, and**
- 2) whether they believe the process was fair.**



# Fairness to Participants: Roles in the Process

- Immigration Judge
- Legal Technician/Legal Assistant
- Interpreter
- DHS Counsel
- Respondent's Counsel
- Witnesses
- Detention Officers
- Court Administrator
- LOP Provider



# Fairness to Participants: Common Terminology

- Proceeding and hearing [REDACTED]  
[REDACTED]
- Respondent
- ROP
- Alien
- BIA
- Qualified representative
- Pleading
- Relief [REDACTED]



The fair administration of justice is based upon two principles:

1. Actual  
Fairness

2. Perceived  
Fairness



# A “perception” is...

1. A recognizable impression received by the mind through the senses (i.e., to become aware of through sight, hearing, touch, taste, or smell);
2. A feeling or observation obtained through the use of one's senses.

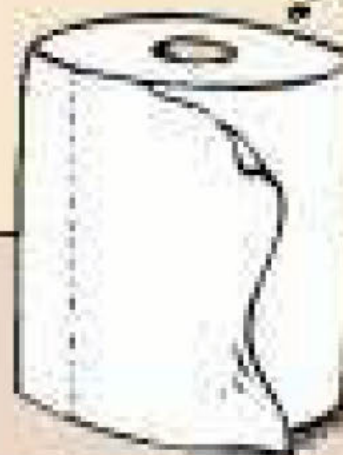
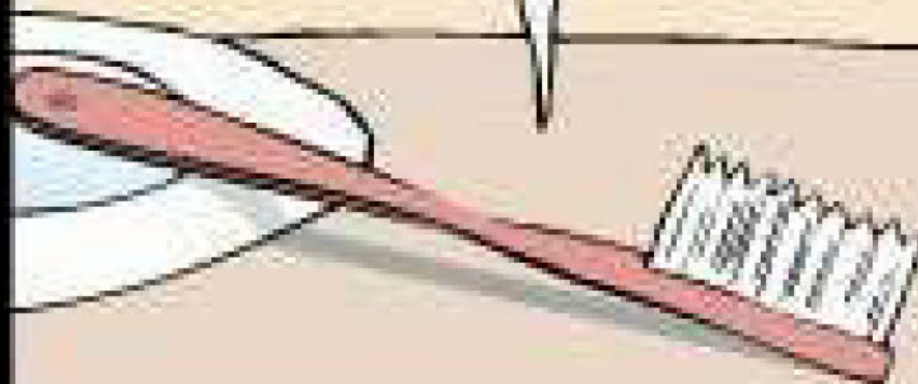
A perception is a function of the way we select, organize, and interpret information.

In other words, people use their senses to collect data or information about the courts and court procedures. They then select this data, organize it, interpret the data, and draw conclusions about what they believe to be true or not about the courts.



SOMETIMES  
I FEEL  
THAT I  
HAVE THE  
WORST JOB  
IN THE  
WORLD!

YA...RIGHT!



TyPee.com

The public has  
a good deal of  
trust and  
confidence in  
the courts.





# Four Main Elements of Procedural Due Process

## Neutrality

Decision makers who are honest, impartial & base decisions in fact & law.

## Interpersonal Respect

Being treated with dignity and respect & having one's rights protected.

# Rights in an Immigration Proceeding & Advisals

- Written copy of NTA & explanation in plain language
- Wait 10 days before court
- Limited right (privilege) of representation
- Evidentiary rights
- Appeal rights
- Others







# Four Main Elements of Procedural Due Process

## Neutrality

Decision makers who are honest, impartial & base decisions in fact & law.

## Interpersonal Respect

Being treated with dignity and respect & having one's rights protected.

## Participation

The opportunity to express one's views.

## Understanding

Understanding the process & the decision.

# Your Role: Ensuring Fairness from the Start

U. S. Department of Justice  
Immigration and Naturalization Service

## Notice to Appear

### In removal proceedings under section 240 of the Immigration and Nationality Act

(b) (6)

In the Matter of:

Respondent: (b) (6)

currently residing at:

SERVICE PROCESSING CENTER, ICE 1115 NORTH IMPERIAL AVENUE  
EL CENTRO CALIFORNIA 92243

(Number, street, city state and ZIP code)

(760) 336-4600

(Area code and phone number)

- ☐ 1. You are an arriving alien.  
☒ 2. You are an alien present in the United States who has not been admitted or paroled.  
☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

Department of Justice  
Executive Office For  
Immigration Review

SEP 23 2005

The Service alleges that you:

- 1) You are not a citizen or national of the United States;
- 2) You are a native of MEXICO and a citizen of MEXICO;
- 3) You arrived in the United States at or near Calexico, California, on or about September 16, 2005;
- 4) You were not then admitted or paroled after inspection by an Immigration Officer.

U.S. Immigration Court  
El Centro, California  
Received By: \_\_\_\_\_

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.  
☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

"TO BE CALENDARED AND NOTICE PROVIDED BY THE OFFICE OF THE IMMIGRATION JUDGE." 1115 N. Imperial Ave., El Centro, CA 92243

(Complete Address of Immigration Court, Including Room Number, if any)

on a date to be set at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above.

EXHIBIT#  
DATE  
I.D. ONLY ADMITTED

(b) (7)(C)

(Signature and Title of Issuing Officer)

Calexico, California

(City and State)

Date: September 16, 2005

See reverse for important information

Form I-862 (Rev. 3/22/99)N

## Notice to Appear



# Notice: Start with a Level Playing Field



- Notice/Service of allegations & charges
- Notice of Hearing
- Notice of rights & obligations



# Proper service?



A Notice to Appear can be served by personal service or regular mail.



## Notice to Respondent

**Warning:** Any statement you make may be used against you in removal proceedings.

**Alien Registration:** This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

**Representation:** If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

**Conduct of the hearing:** At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

**Failure to appear:** You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

### Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

(b) (6)

(Signature of Respondent)

Before:

(Signature and Title of INS Officer)

Date: 1/22/03

### Certificate of Service

This Notice to Appear was served on the respondent on January 22, 2003, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

(Date)

- ☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail
- ☐ Attached is a credible fear worksheet.
- ☐ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the Chinese language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(b) (6)

(Signature of Respondent if Personally Served)

(b) (7)(C)

(Signature and Title of Officer)

# *Reversal for Abuse of Discretion*

The touchstone of due process is protection of the individual against **arbitrary action** of government.

Wolff v. McDonnell,  
418 U.S. 539, 558  
(1974).




# Foundation of the Judicial System



The authority of a tribunal rests on public acceptance of judicial decisions.



A close-up, slightly blurred image of the American flag, showing the stars and stripes. The flag is draped and wavy, with the blue field of stars on the left and the red and white stripes on the right.

American freedoms and  
prosperity are linked to a  
200-year old tradition of  
respect for the law.





# Four Main Elements of Procedural Due Process

## Neutrality

Decision makers who are honest, impartial & base decisions in fact & law.

## Interpersonal Respect

Being treated with dignity and respect & having one's rights protected.

## Participation

The opportunity to express one's views.

## Understanding

Understanding the process & the decision.

# Immigration Law Basics



# 2018

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This outline is a companion to the New Immigration Judge Training provided by the Executive Office for Immigration Review.

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## I. Types of Immigration Status

### A. **U.S. Citizen (USC)**

1. Naturalization: the process of an LPR becoming a U.S. citizen
  - a) *Requirements: 5 years lawful permanent resident (LPR) status (3 years if married to USC); English and civics test; good moral character; oath of allegiance*
  - b) *Benefits: not removable (except fraud); may petition for certain family members; may vote; may work in certain government positions; may travel at will*
2. Proof of Citizenship: Certificate of Citizenship or U.S. passport

### B. **Alien / Noncitizen**

1. **Alien**: a person who is a noncitizen, or not a national of the United States; term used in the INA
2. **Noncitizen**: used interchangeably with “alien”; does not carry the same negative connotation

### C. **Immigrant vs. Nonimmigrant**

1. **Immigrant**: Every alien except those who are specified in non-immigrant categories (per INA § 101)
2. **Nonimmigrant**: A noncitizen designated in INA § 101 (usually one who seeks to enter or is in the United States on a temporary visa and for a specific purpose) (e.g., students, business travelers, visitors for pleasure, etc.)

### D. **Lawful Permanent Resident (LPR)**

1. An alien who entered the United States on an immigrant visa, or who has adjusted status from nonimmigrant to immigrant in the U.S.
2. Proof of LPR status: Form I-551, Permanent Resident Card (a.k.a. “green card”)
  - a) *Proof of LPR status, work authorization, and to travel back into the U.S. from trips abroad*
  - b) *Issued by United States Citizenship & Immigration Services (CIS)*
  - c) *Must be renewed every 10 years, but can be replaced if lost or stolen.*
  - d) *The green card is now green, again!*
3. Proof of work authorization: Form I-765, Employment Authorization Document (EAD)
  - a) *Also called a “work permit” or “work visa”*
  - b) *Proof of nonimmigrant status and work authorization.*

**E. Unaccompanied Alien Child (UAC)**

Under the Homeland Security Act of 2002, a UAC is defined as a child who: (1) has no lawful immigration status in the United States, (2) has not attained 18 years of age, and (3) has no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. 6 U.S.C. § 279(g)(2).

**II. Immigration Court Terminology**

**A. Alien Number (A-Number)**

A noncitizen's unique ID number, which is necessary to identify him in immigration proceedings (e.g., A123 456 789)

**B. Respondent vs. Applicant**

1. **Respondent:** an alien in removal proceedings who is “responding” to a Form I-862, Notice to Appear (NTA)
2. **Applicant:** an alien in asylum-only or withholding-only proceedings, who is applying for relief (and is not responding to an NTA)

**C. Form I-862, Notice to Appear (NTA)**

The charging document issued by the Department of Homeland Security (DHS) that initiates removal proceedings against a noncitizen respondent. Jurisdiction vests with the immigration court once the NTA is filed.

The NTA contains: (1) A-number, name, and address of alien; (2) factual allegations; (3) charges of removability; (4) hearing information; (5) notification of alien's rights and consequences of failing to appear for hearing or change address with the Court; (6) optional request for a prompt hearing; and (7) certificate of service. The statutory requirements for NTAs are listed in INA § 239(a)(1).

**Other documents that are often filed with the NTA:**

1. Conviction documents (if the respondent is alleged to be removable on criminal grounds)
2. Any applications for relief that were filed with CIS and referred to the immigration court
3. Form I-213, Record of Deportable/Inadmissible Alien: documents an immigration officer's initial encounter with the alien
4. Form I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act: summary of an immigration officer's questions and the alien's answers at his initial border interview
5. Form I-870, Record of Determination/Credible Fear Worksheet: an immigration officer's notes and assessment regarding whether an alien who expresses a fear of returning to his country has a “credible fear” or persecution

#### **D. Master Calendar Hearing (MC or MCH)**

These hearings are the first few that an alien has before an immigration judge. During these hearings, the NTA is reviewed, pleadings are taken, removability is established, the alien is asked to identify the form of relief he intends to pursue, and filing deadlines are set.

1. If an alien disputes his removability, a “contested” master calendar hearing may be set to allow the parties to present evidence regarding the alien’s removability.
2. Although an immigration judge must always find an alien removable before resolving applications for relief, an oral or written decision on removability may sometimes be rendered separately from a decision regarding the alien’s application for relief, when removability is contested.
3. If removability is not contested, or if the contested issue does not merit its own decision, the removability finding or lack of dispute will simply be noted in court and included in the final oral or written decision.

#### **E. Individual Merits Hearing**

During this hearing, the alien presents his case for relief from removal through the presentation of evidence and testimony. An individual merits hearing may be continued to a future date if there is more testimony or documentary evidence which could not be presented within the amount of time for which the hearing was calendared. At the conclusion of the hearing, the immigration judge usually issues an oral or written decision on the alien’s request for relief.

#### **F. Pro se**

“For self,” i.e., not represented. Respondents may proceed pro se, but should be advised of their right to be represented at their immigration proceedings, at no cost to the government. *See* 8 C.F.R. § 1003.16. If not wishing to proceed pro se, they may be represented by a person meeting specific requirements such as an attorney, a “reputable individual,” or an “accredited representative” of a “recognized organization.” *See* 8 C.F.R. § 1292.

### **III. Types of Immigration Proceedings**

#### **A. Deportation and Exclusion Proceedings**

Prior to the passage of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), immigration proceedings were classified as either “deportation” or “exclusion” proceedings.

- a) *These proceedings apply only to proceedings initiated **prior to April 1, 1997.***
- b) *Aliens in deportation and exclusion proceedings were served with a Form I-221, Order to Show Cause and Notice of Hearing, rather than an I-862, NTA.*

*c) Deportation and exclusion proceedings are completely separate proceedings—an alien was placed in either proceeding based on the charges levied against him.*

1. **Deportation Proceedings:** used to determine only whether an alien who is physically present in the United States is “deportable” from the United States

*a) In order to prevail in deportation proceedings, an alien is required to show that he lawfully entered the United States.*

*b) The grounds of deportability are listed in INA § 237.*

*c) Deportable aliens include nonimmigrants and lawful permanent residents (LPRs) who were lawfully admitting and were in a lawful status, but are now deportable.*

2. **Exclusion Proceedings:** used to determine only whether an alien who is seeking admission to the United States is “excludable” or “inadmissible” to the United States.

*a) An alien can prevail in exclusion proceedings by applying for an applicable form of relief or withdrawing his application for admission.*

*b) The grounds of inadmissibility are listed in INA § 212.*

*c) Inadmissible aliens include aliens who have not been lawfully admitted, including aliens who entered without being inspected, some LPRs who are returning to the United States after having spent too much time abroad or committing a crime, and aliens applying for immigration benefits but are ineligible for those benefits.*

(1) Note: Any alien who is inadmissible may also be deportable.

## **B. Removal Proceedings**

With the passage of IIRIRA, Congress condensed deportation and exclusion proceedings into one procedural mechanism: “removal” proceedings.

*a) These apply to proceedings initiated **on or after April 1, 1997.***

*b) Aliens in removal proceedings are served with an NTA.*

1. Removal proceedings address whether an alien is “removable.”

*a) Removability is the basis for “removing” or deporting a noncitizen who is ineligible to remain lawfully in the U.S.*

*b) This term includes both inadmissibility (INA § 212) and deportability (INA § 237) grounds.*



## 2. Burden of Proof

*a) An alien in removal proceedings can prevail by establishing that she is not removable as charged or by being granted a form of relief from removal.*

*b) If an alien contests her removability, the burden of proof for establishing removability depends on her noncitizen classification:*

(1) **Arriving Aliens:** An arriving alien must prove that she is clearly and beyond a doubt entitled to be admitted and is admissible. INA § 240(c)(2)(A); 8 C.F.R. § 1240.8(b); *see* 8 C.F.R. § 1001(q) (defining arriving alien).

(2) **Aliens Present without Admission or Parole:** DHS must prove by clear and convincing evidence that the respondent is an alien. If alienage is established, then the respondent must prove by clear and convincing evidence that she has been admitted and is lawfully present in the U.S. INA § 240(c)(2)(B); 8 C.F.R. § 1240.8(c); *See* INA § 101(a)(13) (defining admission).

(3) **Admitted Aliens:** DHS must prove by clear and convincing evidence that the respondent is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

*c) An immigration judge's finding regarding an alien's removability is appealable to the Board of Immigration Appeals (BIA).*

## C. Expedited Removal, Credible Fear and Reasonable Fear Proceedings

Some aliens are ineligible for removal proceedings because they are not entitled to a hearing before an immigration judge, nor are they entitled to apply for relief. These aliens are subject to expedited removal in lieu of removal proceedings:

*a) Noncitizen who enters the United States without valid documents or by fraud for the first time*

*b) Noncitizen who was previously deported and returns to the United States, if DHS "reinstates" his prior order of removal*

(1) **NOTE:** If an individual reenters the United States after being deported, DHS has the sole discretion to either reinstate his order of removal (which subjects him to expedited removal) or issue him a new NTA (which places him in removal proceedings). *See* INA § 241(a)(5).

If an alien is subject to expedited removal but expresses a fear of returning to his home country, he is entitled to a screening interview with an immigration officer to assess his eligibility for fear-based relief.

*a) If an alien falls under category (a) above (enters without valid documents or by fraud for the first time), he must demonstrate to an*

*immigration officer that he has a credible fear of returning to his home country.*

*b) If an alien falls under category (b) above (reenters after deportation), he must demonstrate to an immigration officer that he has a reasonable fear of returning to his home country.*

An immigration officer will interview the alien, determine whether the alien has a credible or reasonable fear of returning to his home country, and document this finding. This interview is called a credible fear or reasonable fear interview.

*a) If the immigration officer finds that the alien has a credible or reasonable fear, he is placed in withholding-only proceedings (see below).*

*b) If the immigration officer does not find that the alien has a credible or reasonable fear, the alien can appeal this determination to an immigration judge. If he does not appeal, he is subject to expedited removal.*

If the alien does appeal, he is placed in credible or reasonable fear proceedings, the limited purpose of which is to determine whether the immigration judge agrees with the immigration officer's assessment. If the immigration judge finds that the alien has a credible or reasonable fear, the alien is placed into withholding-only proceedings (see below). On the other hand, if the immigration judge finds that the alien does not have a credible fear, he is subject to expedited removal.

*a) An immigration judge's credible or reasonable fear finding is not appealable to the BIA.*

#### **D. Asylum-Only and Withholding-Only Proceedings**

Asylum-only and withholding-only proceedings essentially limit an alien to applying ONLY for asylum under INA § 208, withholding of removal under INA § 241(b)(3), or relief under Article 3 of the United Nations Convention Against Torture or Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), pursuant to 8 C.F.R. § 1208.16. An immigration judge's decision rendered in asylum- or withholding-only proceedings is appealable to the BIA.

*a) Aliens in asylum-only or withholding-only proceedings are generally placed into proceedings with the immigration court through the issuance of a Form I-863, Notice of Referral to Immigration Judge.*

*b) Because removability is not at issue in asylum- or withholding-only proceedings, the only issue before the immigration judge is whether the applicant is eligible for relief.*

1. **Asylum-Only Proceedings:** An alien is placed in these proceedings if he is a stowaway, crewmember, visa waiver applicant who overstays,

cooperating witness, informant, or subject to removal on certain security-related grounds.

*a) An applicant in asylum-only proceedings may only file for asylum, withholding of removal, or protection under CAT.*

2. **Withholding-Only Proceedings:** An alien is placed in these proceedings if he previously received an administratively final order of removal and reentered the United States (see above). If an alien is determined to have a credible fear by either an immigration officer or an immigration judge, he is placed in withholding-only proceedings.

*a) An applicant in withholding-only proceedings may only file for withholding of removal or protection under CAT.*

#### **E. Rescission Proceedings**

If CIS or an immigration judge initially granted LPR status to an alien based on certain facts that later turn out to be false, the alien's LPR status can be rescinded on the basis that he was not actually eligible for adjustment of status at the time his was granted LPR status.

*a) When this happens, CIS issues a Notice of Intent to Rescind to the alien, who can either admit the allegations contained therein, submit a written answer to allegations contained therein, fail to respond, or request a hearing before an immigration judge.*

*b) If the alien requests a hearing before an immigration judge, he is entitled to one under the regulations. See 8 C.F.R. 246.3. At this hearing, the Court will evaluate whether the alien's LPR status should be rescinded.*

#### **F. Visa Petition Proceedings**

If an alien applies for and is denied a family-based visa petition (spouse, parent/child, sibling) by CIS, he can appeal directly to the BIA (not an immigration judge), which will conduct a *de novo* review of the CIS's decision.

#### **G. Bond Proceedings**

A detained alien who is eligible for release on bond may request that a bond be set so that he can remain nondetained while his removal proceedings are completed. In order to be granted a bond, an alien must file a motion for a bond. The Court will then hold a custody hearing, during which the alien presents, and the DHS responds to, his case for a bond. At the conclusion of the hearing, the immigration judge renders an oral or written decision granting or denying bond. The Court's decision is appealable to the BIA.

*a) Aliens ineligible for bond are those subject to mandatory detention. This includes aliens who have been convicted of certain crimes*

*or involved in terrorist activities, and arriving aliens. See INA § 236(c); 8 C.F.R. § 1001.1(q).*

#### **IV. Relief from Removal**

In general, immigration relief is a benefit noncitizens can seek to remain in or be admitted to the United States. Noncitizens can apply defensively while they are in immigration proceedings to stop their deportation, or they can apply affirmatively if they are in nonimmigrant status or undocumented. In the removal context, noncitizens are defending against their deportability. Outside the removal context, an undocumented immigrant will likely want to know whether she is eligible for any immigration relief so that she can obtain legal status and remain in the US lawfully.

Some forms of relief come with great benefits, such as a pathway to LPR status and, eventually, citizenship. Others are more limited and serve only to prevent a noncitizen's deportation.

##### **A. Waivers of Inadmissibility Grounds**

There are certain factors that make a noncitizen inadmissible, and therefore ineligible for relief. However, certain noncitizens may be able to request “waiver” of their inadmissibility to qualify for relief. There are a number of waivers in immigration law, each of which is specific to the ground of inadmissibility and type of relief requested.

##### **B. Asylum**

An alien is eligible for asylum if he has suffered past persecution or has a well-founded fear of future persecution in his home country on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 208; 8 C.F.R. §§ 1208.13–.15. An asylum applicant must also demonstrate that he warrants a favorable exercise of discretion. *See* 8 C.F.R. §1208.14.

##### **1. Bars to Relief**

- a) 1-year application deadline*
- b) Criminal issues (aggravated felon, persecutor, terrorist, etc.)*
- c) Firmly resettled in another country*

##### **2. Benefits of Relief**

- a) Indefinite relief*
- b) Work authorization*
- c) May apply for green card after 1 year*
- d) Travel abroad to any country other than home country*

##### **C. Withholding of Removal**



An alien cannot be removed to a country where it is more likely than not that he would be persecuted in that country because of his race, religion, nationality, membership in a particular social group, or political opinion. See INA § 241(b)(3); 8 C.F.R. § 1208.16.

1. Distinguished from Asylum:

- a) *The “more likely than not” standard is higher than the burden of proof for asylum.*
- b) *Asylum is discretionary; withholding of removal is mandatory.*
- c) *Not as many benefits as asylum. Unlike asylum, withholding of removal is revocable without any fault on the alien’s part; work authorization is available, but must be renewed annually; the alien may never apply for a green card; and the alien cannot travel abroad.*

2. Bars to Relief

- a) *Criminal issues (aggravated felon, persecutor, terrorist, etc.)*

**D. Withholding and Deferral of Removal under Article III of the Convention Against Torture (CAT)**

An alien cannot be removed to a country where it is more likely than not that he will be tortured by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in that country. 8 C.F.R. §§ 1208.16(c)–(d), .17–.18.

1. Distinguished from Asylum and Withholding of Removal under the Act:

- a) *CAT is mandatory, not discretionary*
- b) *Although withholding of removal under CAT shares the same bars to relief as withholding of removal under the Act (e.g., criminal bars), there are no bars to deferral of removal under CAT.*
- c) *Although withholding of removal under CAT shares the “more likely than not” standard with withholding of removal under the Act, that is the only similarity in the burden of proof for each form of relief.*

(1) CAT deals with “torture”—conduct that is much more extreme than persecution. See 8 C.F.R. § 1208.18.

(2) CAT has an explicit and high standard for government involvement, which is not applicable to withholding of removal under the Act. See 8 C.F.R. § 1208.18.

2. For eligibility purposes, the only difference between withholding of removal under CAT and deferral of removal under CAT is that certain criminal aliens are barred from receiving the former, but not the latter.

**E. Other Humanitarian-Based Relief**

In addition to the above, an alien can apply for humanitarian relief through United States Citizenship & Immigration Services (CIS). CIS adjudicates each of the following applications, and appeals of CIS's decisions are made to the Administrative Appeals Office (AAO), instead of the Board of Immigration Appeals (Board).

1. The Violence Against Women Act (VAWA) provides relief to aliens who are survivors of domestic violence by a USC or LPR. See Violence of Against Women Act, enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1786, 1902.

a) *In 1994, Congress enacted VAWA, which allows noncitizens to “self-petition” for LPR status instead of having to rely on their abusive spouse to complete the family petition process. Since then, VAWA has been reauthorized and expanded multiple times.*

b) *General Eligibility Requirements:*

(1) Survivor of domestic violence who was subject to *battery or extreme cruelty* by USC or LPR spouse

(a) Applicants can be women or men

(b) Derivative child can also apply

(2) Good faith marriage

(3) Residence with abuser

(4) Good moral character

2. The U-visa provides relief for victims of criminal acts in the United States who cooperate with law enforcement in the prosecution of their attackers.

3. The T-visa provides relief for victims of human trafficking in the United States.

4. Special immigrant juvenile (SIJ) status provides relief for immigrant minors who have been abused, abandoned, or neglected by their parents.

## **F. Adjustment of Status**

An alien who applies for and is granted adjustment of status “adjusts” his status to that of an LPR. An application for adjustment is adjudicated by either CIS or an immigration judge, depending on the circumstances.

1. Pathways to Adjustment of Status: Adjustment of status is only available to aliens who have *first* been granted specific visas or petitions, such as a family- or employment-based visa, U-visa, VAWA relief, cancellation of removal, or asylum.

2. Eligibility:

a) *Lawfully admitted or paroled*

b) *Eligible to receive an immediately available immigrant visa*

- c) *Admissible (no inadmissibility grounds)*
- d) *Warrants a favorable exercise of discretion*

## **G. Cancellation of Removal**

Cancellation of removal is a form of relief available to both LPRs and non-LPRs, but only those who are currently *in removal proceedings*. CIS does not adjudicate requests for cancellation of removal. If an LPR is in removal proceedings and is granted cancellation of removal, it operates to protect his status. By contrast, if a non-LPR is granted cancellation of removal, it operates to grant him LPR status.

1. Eligibility for Cancellation of Removal for LPRs (INA § 240A(a))
  - a) *LPR status for at least 5 years*
  - b) *Resided continuously in U.S. for at least 7 years after admission in any status*
  - c) *No aggravated felony convictions*
  - d) *Merits a favorable exercise of discretion*
2. Eligibility for Cancellation of Removal for Non-LPRS (INA § 240A(b))
  - a) *Physically present in U.S. for continuous period of at least 10 years immediately before application is adjudicated*
  - b) *Good moral character during the 10-year period*
  - c) *No convictions for certain removable offenses*
  - d) *Qualifying relative (USC or LPR spouse, parent, or child) will suffer "exceptional and extremely unusual" hardship*
  - e) *Merits a favorable exercise of discretion*

Special forms of cancellation of removal are also available to VAWA recipients and certain nationals of El Salvador, Guatemala, former Soviet Union territories, and Eastern European nations.

3. Eligibility for Cancellation of Removal for VAWA Recipients ("Special Rule" Cancellation of Removal) (INA § 240A(b)(2))
  - a) *Noncitizen applicant was subject to battery or extreme cruelty by a USC or LPR spouse or parent, or has a child that was subjected to such abuse*
    - (1) Applicants can be women or men
    - (2) Includes a USC or LPR whom the applicant intended to marry, but whose marriage is not legitimate because of the USC's or LPR's bigamy. *See* INA § 240A(b)(2)(A)(III).
    - (3) An applicant can be a LPR or non-LPR. *See Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009).

- b) *Physically present for at least 3 years immediately before application*
- c) *Good moral character for those 3 years*
- d) *Not removable under specific grounds*
- e) *No aggravated felony conviction*
- f) *Merits a favorable exercise of discretion*

4. Eligibility for Nicaraguan and Central American Relief Act (NACARA)

NACARA cancellation of removal is available to certain nationals of Nicaragua, El Salvador, Guatemala, former Soviet Union territories, and Eastern European nations. It was enacted in response to events that unfolded in the 1980s, when civil wars devastated El Salvador and Guatemala and the Soviet Union was collapsing. In response, thousands of refugees fled these war-torn areas for the United States, which enacted NACARA relief to protect them.

NACARA was once a common form of immigration relief in the 1990s and early 2000s, but is less common today because it requires that a noncitizen has been in the United States since at least 1990. Nevertheless, some noncitizens remain eligible and may apply for NACARA cancellation of removal in order to obtain LPR status.

Applicants for NACARA cancellation of removal must meet the following requirements:

- a) *Entered U.S. on or before 1990 and applied for asylum (dates vary based on country of nationality)*

- (1) Derivate family members (spouse and children) may apply by showing that they meet the same eligibility requirements

- b) *Not removable under specific grounds*
- c) *Physically present in U.S. for a continuous period of at least 7 years immediately before adjudication of application*
- d) *Good moral character during the same period*
- e) *Removal would cause "extreme hardship" to the noncitizen or his qualifying relative (USC of LPR spouse, parent, or child)*

**H. Voluntary Departure (VD)**

Voluntary Departure is often viewed as an alternative to deportation. This is because an alien granted voluntary departure is still required to leave the United States, but can do so without many of the long-term consequences of being deported. Voluntary departure is only available to aliens in removal proceedings, and requires that the alien depart the United States within a specific time period *at their own expense* (by contrast, the *government* pays to have an alien deported).

There are two types of voluntary departure, and they have different requirements and limitations. Regardless of the type of voluntary departure granted, an alien can only be granted voluntary departure *once*.

1. “Pre-Conclusion” Voluntary Departure (INA § 240B(a)(1); 8 C.F.R. § 1240.26(b))

- a) Requested prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing*
- b) Makes no additional request for relief, or withdraws request for relief already made*
- c) Concedes removability*
- d) Waives appeal of all issues*
- e) Not convicted of certain disqualifying crimes*
- f) Maximum of 120 days to depart*

2. “Post-Conclusion” Voluntary Departure (INA § 240B(b)(1); 8 C.F.R. § 1240.26(c))

- a) Requested at the conclusion of removal proceedings*
- b) Physically present in United States for at least 1 year*
- c) Good moral character for 5 years*
- d) Not convicted of certain disqualifying crimes*
- e) Means and intent to depart the United States*
- f) Pays voluntary departure bond of at least \$500*
- g) Maximum of 60 days to depart*